No. 86-337 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY, PETITIONER

v.

OKLAHOMA TAX COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, in a case alleging that a state has overvalued railroad property for ad valorem property tax purposes, the prohibition against discriminatory state taxation of railroads in Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. 11503, is limited to purposeful overvaluation with discriminatory intent.

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INTEREST OF THE UNITED STATES

This case concerns the scope of federal court jurisdiction to restrain discriminatory state taxation of railroads under Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 54 (codified at 49 U.S.C. 11503). The 4R Act, developed over the course of 15 years of congressional investigation and study, is an integral part of a national transportation policy intended to protect interstate rail commerce from the burdens of discriminatory state taxation. The United States has a strong interest in preserving the federal courts' power to enforce these statutory protections. This Court on a previous occasion has invited the United States to express its views on the question presented. See U.S. Amicus Br., *Burlington N. R.R.* v. *Lennen*, No. 83-802, cert. denied, 467 U.S. 1230 (1984) (U.S. *Lennen* Br.).

STATEMENT

1. Section 306 of the 4R Act prohibits, and vests federal district courts with jurisdiction to enjoin, state tax practices that discriminate against railroads. Congress enacted the law, after 15 years of study, in response to its findings that the nation's railroads were in poor economic condition and that their revitalization required elimination of the long-standing burden placed on them by widespread discriminatory state taxation of railroad property. Congress expressly found that such taxation "constitute[s] an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce" (§ 306(1), 90 Stat. 54). This statutory prohibition against discriminatory taxation is an integral part of Congress's comprehensive attempt to revitalize the railroad industry. See U.S. *Lennen* Br. at 1-3.

Section 306 broadly prohibits a state from imposing any tax "which results in discriminatory treatment of a common carrier by railroad" (§ 306(1)(d), 90 Stat. 54).[1] With respect to tax rates, the statute forbids a state to impose a tax rate on railroad property higher than the rate imposed on other commercial and industrial property (§ 306(1)(c), 90 Stat. 54). With respect to tax assessments (and taxes levied or collected based on assessments), the statute declares a state's assessment practices unlawfully discriminatory unless there is a rough equality between (a) the ratio of assessed value to "true market value" for rail-

[1] When recodified in 1978, this statutory language was altered slightly to prohibit any tax "that discriminates against a rail carrier providing transportation subject to the jurisdiction of the [Interstate Commerce] Commission." Pub. L. No. 95-473, 92 Stat. 1446 (codified at 49 U.S.C. 11503(b)(4)). This change was made solely "for clarity." See 49 U.S.C. 11503 (Historical and Revision Notes). All of the 4R Act provisions discussed in this brief are now codified at 49 U.S.C. 11503, and there is no significant difference between the original and recodified versions.

road property and (b) the ratio of assessed value to "true market value" for all other commercial and industrial property (§ 306(1)(a) and (b), 90 Stat. 54). Unlawful discrimination occurs if the first ratio exceeds the second by at least 5% (§ 306(2)(c), 90 Stat. 54).

The statute provides that "the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law" (§ 306(2)(d), 90 Stat. 55). A railroad is permitted to use a statistical sampling technique to establish the ratio of assessed value to true market value for all other (*viz.*, non-railroad) commercial and industrial property (§ 306(2)(e), 90 Stat. 55). If that ratio cannot be satisfactorily established by such a random-sampling method, the court is required to base its computation on "all other property in the assessment jurisdiction," not just on the commercial and industrial property (*ibid.*). If state tax practices are found to discriminate against railroads, a federal district court is empowered under Section 306(2) to enjoin the violation, notwithstanding the Tax Injunction Act, 28 U.S.C. 1341.

As the courts of appeals have unanimously concluded, Section 306 is violated not only by de jure discrimination but also by de facto discrimination. See *Atchison, T. & S.F. Ry.* v. *Board of Equalization*, 795 F.2d 1442 (9th Cir. 1986); *Richmond, F. & P. R.R.* v. *Department of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985); *Louisville & N. R.R.* v. *Department of Revenue*, 736 F.2d 1495, 1498 (11th Cir. 1984); *Burlington N. R.R.* v. *Lennen*, 715 F.2d 494, 497 (10th Cir. 1983), cert. denied, 467 U.S. 1230 (1984); *Ogilvie* v. *State Bd. of Equalization*, 657 F.2d 204, 210 (8th Cir.), cert. denied, 454 U.S. 1086 (1981). De jure discrimination occurs when a state applies a different tax rate or a different assessment percentage (typically a proportion of market value) to railroad property than to other

commercial and industrial property. De facto discrimination occurs when the rates of tax and assessment are nominally the same but the results obtained in the taxing and assessment process are different. Such de facto discrimination can occur in two ways: a state may underestimate the true market value of non-railroad property, while correctly estimating the true market value of railroad property; or the state may overestimate the true market value of railroad property, while correctly estimating the true market value of non-railroad property. A railroad's claim of the first type of de facto discrimination (undervaluation of non-railroad property) has been termed by the courts a claim for "equalization" relief. A railroad's claim of the second type of de facto discrimination (overvaluation of railroad property) has been termed a claim for "valuation" relief. See, *e.g.*, Pet. App. 2a; *Burlington N. R.R.* v. *Lennen*, 715 F.2d at 496, 497.

2. This case presents a claim for "valuation" relief. Petitioner, a rail carrier, brought this action in the United States District Court for the Western District of Oklahoma to enjoin the Oklahoma Tax Commission from collecting ad valorem property taxes alleged to be excessive and discriminatory under Section 306. Petitioner asserted that Oklahoma tax authorities had so drastically overestimated the market value of its property that the ratio of assessed value to true market value for its property was far in excess of the ratio for non-railroad property (Pet. App. 31a-32a).

The district court, though acknowledging that "the [respondents] themselves admit the existence of a legitimate valuation dispute between the parties," concluded that it lacked jurisdiction to entertain petitioner's claim of discriminatory overvaluation (Pet. App. 16a). In so ruling, the district court relied on the Tenth Circuit's

earlier decision in *Burlington N. R.R.* v. *Lennen*, 715 F.2d at 497-498. In *Lennen*, the Tenth Circuit held that Section 306 was not "intended to provide relief from every form of de facto discrimination" and that only "equalization, not valuation, relief was intended to be made available to the railroads" (*ibid.*). The court noted the specification in Section 306(2)(e) of statistical random sampling as a permissible method for determining the "true market value" of non-railroad property, whereas the statute "contains no discussion of a proper method for valuing rail property"; the court inferred from this silence a legislative intent that the courts should refrain from taking jurisdiction of overvaluation claims (715 F.2d at 497). The Tenth Circuit in *Lennen* also reasoned that, if Section 306 were construed to permit railroads to bring federal court challenges to the states' computation of railroad property's market value, that construction "would impose significant burdens on district courts and would substantially thwart the tax collection process of states and their subdivisions" (715 F.2d at 498). The *Lennen* court accordingly held that Section 306 does not afford relief from discriminatory overvaluation of railroad property unless the complaining railroad "can make a strong showing of a purposeful overvalution * * * with discriminatory intent" (*ibid.*).

Turning to the facts of the instant case, the district court held that it was "without jurisdiction to entertain [petitioner's] *de facto* discrimination claims of overvaluation" (Pet. App. 16a). The court stated that the jurisdictional issue had to be "resolved prior to trial" (*id.* at 12a) and that petitioner's pre-trial filings therefore had to "make the requisite 'strong prima facie case of * * * intentional discrimination' " (*ibid.* (quoting *Lennen*, 715 F.2d at 498)). The court concluded that petitioner had not made the necessary showing of discriminatory intent (Pet. App. 14a-16a) and accordingly "dismissed for lack of subject matter jurisdiction" (*id.* at 16a-17a).

On appeal, petitioner first sought *en banc* review of the district court decision, arguing that the Tenth Circuit should overrule *Lennen*. The United States filed a brief amicus curiae in support of that request. We noted that the Eighth Circuit's decision in *Burlington N. R.R.* v. *Bair*, 766 F.2d 1222 (1985), conflicted with the ruling in *Lennen* and that the issue was of considerable importance to national transportation policy.

The Tenth Circuit rejected petitioner's request for *en banc* review and thereby declined to reconsider *Lennen* (Pet. App. 19a). A panel of the Tenth Circuit subsequently heard petitioner's appeal and affirmed the district court's conclusion that *Lennen* compelled dismissal of the instant suit for lack of subject matter jurisdiction. The panel first reaffirmed the soundness of *Lennen*, reiterating the concern expressed in the earlier case that federal courts should not be asked to " 'sit as state tax assessment boards for railroad property' " (Pet. App. 2a-3a (quoting *Lennen*, 715 F.2d at 498)). The court then agreed with the district court that petitioner had "failed to establish a strong initial showing of [a] prima facie case of intentional discrimination" (Pet. App. 3a). The court reasoned that petitioner had failed to allege that Oklahoma revenue officials had made "remarks regarding an intent to discriminate in valuation" (*ibid.*), had failed to allege any valuation procedure that was discriminatory "on its face" (*id.* at 3a-4a), and had failed to allege "facts from which a trier of fact reasonably could infer discriminatory intent, such as assessments based on flat rates that take no account of an item's value, assessments that ignore changed business conditions, or unexplained radical changes in the methods for calculating value" (*id.* at 4a).

REASONS FOR GRANTING THE PETITION

As in *Lennen*, petitioner challenges the Tenth Circuit's requirement that a railroad show purposeful overvaluation with discriminatory intent when alleging a violation

of Section 306 based on overvaluation of railroad property. We argued in our amicus brief in *Lennen* that the Tenth Circuit's construction of the statute is erroneous. See U.S. *Lennen* Br. at 9-15. We nevertheless recommended against certiorari in that case, chiefly because the issue was then one of first impression in the courts of appeals. *Id.* at 16-17.[2] There is now a conflict in the circuits on the question, and we continue to believe that the Tenth Circuit's requirement of discriminatory intent is inconsistent with the language and purposes of the 4R Act. We therefore urge the Court to grant certiorari in this case.[3]

1. The decision below directly conflicts with the Ninth Circuit's recent decision in *Atchison, T. & S.F. Ry.* v. *Board of Equalization*, 795 F.2d 1442 (1986) (*Santa Fe*). That case, like the instant case, involved a claim for "valuation" relief (795 F.2d at 1445). The Ninth Circuit expressly "decline[d] to adopt the Tenth Circuit's threshold requirement" that a railroad make out " 'a strong showing of a purposeful overvaluation * * * with discriminatory intent' " in order to qualify for relief (*id.* at 1446

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[2] In recommending against certiorari in *Lennen*, we also noted that the district court there had found as a fact that no overvaluation of railroad property had been demonstrated, and we suggested that "this alternative ruling provided a sufficient and independent basis for denying a preliminary injunction" (U.S. *Lennen* Br. at 17). In the present case, of course, there is no such finding that could serve as an alternative ground for the decisions below, since petitioner's overvaluation claim was dismissed prior to any adjudication of whether overvaluation existed.

[3] The second question presented by the petition (Pet. i) concerns petitioner's challenge to the district court's dismissal of the overvaluation claim without an evidentiary hearing. Although this question would not independently warrant the Court's review, we think that it would be appropriate to grant the petition in full, so that the Court will retain the opportunity to determine, in the event that it sustains the discriminatory intent requirement, which allegations will suffice to make an evidentiary hearing necessary.

(quoting *Lennen*, 715 F.2d at 498)). Rather, the Ninth Circuit held, without qualification, that federal courts have jurisdiction over "claims of specific instances of overvaluation in state tax assessment of the true market value of rail transportation property" (*ibid.*). The court reasoned (*ibid.*) that

> Congress enacted the statute to end what it perceived to be the pervasive and longstanding practice of discriminatory taxation of railroads. Given the important remedial objective of the legislation, it is implausible to assert that the Act was not intended to provide relief from every form of de facto discrimination. Such a holding would frustrate the purposes of the statute and lead to irrational consequences.

Accordingly, the Ninth Circuit held that the district court had erred in dismissing a railroad's overvaluation claim for a lack of jurisdiction under Section 306. 795 F.2d at 1443, 1448.[4]

[4] The Ninth Circuit in *Santa Fe* went on to hold that, although a claim of discriminatory overvaluation of railroad property states a claim for relief under Section 306, the district court should abstain from exercising its jurisdiction over the claim pending completion of related state proceedings previously filed by the railroads, proceedings that might result in the railroads' being "collaterally estopped from asserting the valuation issue" subsequently in federal court (795 F.2d at 1447). Judge Norris dissented on this point (*id.* at 1449-1450). The Ninth Circuit's abstention holding appears to conflict with *Southern Ry.* v. *State Bd. of Equalization*, 715 F.2d 522, 529 (1983), cert. denied, 465 U.S. 1100 (1984), where the Eleventh Circuit held that Congress, in enacting Section 306, "meant to guarantee a federal forum for railroad suits, and only an exemption from abstention in all its forms would accomplish this purpose." The railroads have petitioned for a panel rehearing on the abstention issue, contending principally that the panel misconstrued the facts regarding the various pending state-court actions. We understand that the Ninth Circuit has directed the defendants to file a response to the rehearing petition by

The decision below also conflicts either directly or in fundamental principle with the Eighth Circuit's decision in *Burlington N. R.R.* v. *Bair*, 766 F.2d 1222 (1985). The Eighth Circuit there held that "there is no intent element in section 306" and hence that a railroad "need only prove the accurate values, not purposeful undervaluation or overvaluation" (*id.* at 1226). The court stressed that Section 306 requires the district court to make independent findings of fact on the "true market value" of both railroad and non-railroad property (*ibid.*). Otherwise, the court reasoned, "states would be free to discriminate against railroads by assessing a value far in excess of the true market value, while assessing all other property at true market value, and then asserting * * * that assessed value is equal to true value. Regardless of whether it occurs purposefully or by honest error, section 306(1)(a) forbids this type of discrimination" (*id.* at 1225-1226).

The Tenth Circuit below attempted to distinguish *Bair* as involving a claim for "equalization" rather than "valuation" relief, *i.e.*, a claim founded on discriminatory undervaluation of non-railroad property rather than discriminatory overvaluation of railroad property such as is at issue here (Pet. App. 3a). By its own terms, however, the reasoning of *Bair* is fully applicable to claims for "valuation" as well as "equalization" relief. The Eighth Circuit held that under Section 306 a federal court must make findings of fact as to the "true market value" of railroad property and may not defer to a state-law presumption that "assessed values equal true market values" (766 F.2d at 1226). The Eighth Circuit further held that a railroad plaintiff need not show that a state's overvaluation of railroad property is purposeful or inten-

October 3, 1986. As we explain below (pages 12-13, *infra*), we do not believe that the pendency of this panel rehearing petition in *Santa Fe* should cause the Court to deny certiorari here.

tional in order to make out a violation (*ibid.*). Moreover, the *Bair* opinion expressly recognized that, if a railroad were required to prove purposeful overvaluation, "section 306 would be a mere shadow of the relief from discriminatory taxation which Congress intended," since states would then have relative freedom to discriminate against railroads simply by overvaluing railroad property instead of undervaluing other property (*id.* at 1225-1226). The Eighth Circuit's construction of Section 306 is thus inconsistent with the Tenth Circuit's decisions in *Lennen* and in this case.

2. As we explained more fully in our brief in *Lennen*, the Tenth Circuit's requirement of intentional discrimination in overvaluation cases finds no support in the language or legislative history of Section 306. See U.S. *Lennen* Br. at 9-14. The statute clearly focuses on the *results* of state tax assessments, not on state officials' intent in making them. As the original statutory language makes plain, Section 306 prohibits "any * * * tax which results in discriminatory *treatment* of a common carrier by railroad" (§ 306(1)(d), 90 Stat. 54 (emphasis added); see note 1, *supra*). The statutory prohibition on discrimination is defined solely in terms of a simple arithmetic ratio of assessed value to true market value, a definition that makes irrelevant any reference to discriminatory intent (§ 306(1)(a) and (2)(c), 90 Stat. 54). Indeed, the terms "purposeful overvaluation" and "discriminatory intent" can be found nowhere in the language or legislative history of Section 306, but are a gloss on the statute that the Tenth Circuit made up out of whole cloth.

The Tenth Circuit's intent requirement in practical effect would require a federal court to treat a state's determination of the true market value of railroad property as conclusive. Yet the plain language, the legislative history, and the purposes of Section 306 all indicate that the federal courts must inquire into the "true market value" of

railroad property when a railroad makes a valuation claim—when a railroad alleges, in other words, that the assessed-value/market-value ratio for its property exceeds the ratio for other commercial and industrial property. Indeed, there is no dispute that "equalization" claims are cognizable under Section 306 regardless of proof of intentional discrimination. But a state can achieve precisely the same discriminatory result by overvaluing railroad property as by undervaluing non-railroad property. The Tenth Circuit's rule thus allows a form of discriminatory taxation that Section 306 was designed to forbid. The ruling below seriously undermines the broad congressional purpose to outlaw all forms of discriminatory taxation and thereby help restore the nation's railroads to economic vitality. See U.S. *Lennen* Br. at 9-13.

As we noted in our *Lennen* brief, we share the Tenth Circuit's "concern that the federal courts not be converted, by virtue of Section 306, into review boards for determining the correctness of the states' annual assessments of railroad property values." U.S. *Lennen* Br. at 13-14.[5] This concern, however, does not justify judicial rewriting of the statute to require proof of discriminatory intent. Such a requirement would greatly complicate litigation and would have the ironic effect of demanding intrusive judicial probing of state decisionmaking. Congress itself carefully crafted a balance between federal and state interests, making available a federal forum for relief from discrimination against a railroad *qua* railroad, yet adopting other provisions designed to minimize interference with state taxing

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[5] It is that concern which appears to underlie, not only the Tenth Circuit's holdings, but also the Ninth Circuit's recently imposed requirement that district courts abstain from deciding "valuation" claims pending the completion of state-court proceedings. *Santa Fe*, 795 F.2d at 1446-1449; see note 4, *supra*.

authority.[6] See, *e.g.*, *Richmond, F. & P. R.R.* v. *Department of Taxation*, 762 F.2d at 380. The court of appeals had no license, by adopting an "intentional discrimination" requirement unsupported by the statute's language, to alter the balance that Congress quite deliberately struck.

In our view, Section 306 prohibits any overvaluation of railroad property that results "from an assessment rule or methodology that—either on its face or as applied—systematically determines excessive values for railroad property. On the other hand, if a railroad, like any other state taxpayer, asserts only that the state made an error in reaching an excessively high value for its property, no relief for that overvaluation claim would be available under Section 306." U.S. *Lennen* Br. at 14-15. This construction of the statute empowers the district courts to remedy discriminatory taxation founded on systematic overvaluation without subjecting each and every assessment of railroad property to federal court review. Unlike the Tenth Circuit's construction, this reading of Section 306 is faithful to the statutory language and fully protects against the kinds of discrimination that Congress sought to eliminate.

3. Because the ruling of the court of appeals in this case squarely conflicts with the Ninth Circuit's decision in *Atchison, T. & S.F. Ry.* v. *Board of Equalization, supra*, and because the Tenth Circuit's erroneous decision significantly impairs national transportation policy, we urge the Court to grant certiorari in the instant case. We note that there is currently pending before the Ninth

[6] For example, Congress provided that the burden of proof under Section 306(2)(d) must follow state law, so that a railroad will generally have the burden of proof. Congress also provided "a 5-percent tolerance factor" to limit federal intrusions (S. Rep. 91-630, 91st Cong., 1st Sess. 14-15 (1969)) and postponed the effective date of Section 306 for three years to allow states to take necessary corrective measures. See U.S. *Lennen* Br. at 15-16 n. 8.

Circuit a petition for panel rehearing in *Santa Fe*. See note 4, *supra*. That petition for rehearing is not addressed to the panel's holding that the federal courts have jurisdiction to hear a railroad's Section 306 overvaluation claim without any requirement of discriminatory intent, but only to the panel's further holding that a district court should abstain from hearing an overvaluation claim until the completion of related state-court proceedings, which might then have some preclusive effect on issues in the federal overvaluation proceeding.

We do not believe that the pendency of the petition for panel rehearing in *Santa Fe* should cause the Court to decline to grant certiorari here. Because that rehearing petition does not address the "discriminatory intent" question, the present conflict in the circuits will continue to exist regardless of how the petition for rehearing in *Santa Fe* is disposed of. We believe the Ninth Circuit's holding on abstention to be incorrect, and that holding in some circumstances could have much the same practical effect on railroads as the Tenth Circuit's erroneous ruling as to jurisdiction here. If the Ninth Circuit's abstention ruling survives the pending rehearing petition, and if a petition for certiorari challenging that ruling is ultimately filed in *Santa Fe*, the abstention question may well merit this Court's review, either in tandem with or subsequent to the Court's consideration of the instant case.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court may wish to defer consideration of the petition until the Ninth Circuit rules on the petition for rehearing now pending in *Santa Fe*.

Respectfully submitted.

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